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In the

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Transportation et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE MARYLAND WOMEN BUSINESS ENTREPRENEURS ASSOCIATION, THE NATIONAL ASSOCIATION OF WOMEN BUSINESS OWNERS, THE ILLINOIS ASSOCIATION OF WOMEN CONTRACTORS AND ENTREPRENEURS, WBE LINE, INC., FEDERATION OF WOMEN CONTRACTORS & WOMEN'S BUSINESS DEVELOPMENT CENTER IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Maryland Women Business Entrepreneurs Association, the National Association of Women Business Owners, the Illinois Association of Women Contractors and Entrepreneurs, WBE Line, Inc., the Federation of Women Contractors, and the Women's Business Development Center ("Coalition") filing this amicus curiae brief[1] are organizations consisting of approximately 5,000 women business owners throughout the United States. Providing women business owners with the opportunity to fairly compete for federal government contracts is one of the primary missions of the Coalition organizations. These Coalition members represent virtually all service and trade industries, and act as prime contractors and subcontractors. A significant number of these women have been afforded the realistic opportunity to contract with the federal government under the auspices of § 502 of the Small Business Act and § 105(f) of the Surface Transportation Relocation Assistance Act ("STURAA").

Coalition members have experienced and studied the detrimental effects of a closed federal procurement market on women business owners. Without the Small Business Act and STURAA goals programs, many of the Coalition members would not have had the opportunity to bid for federal contracts or subcontracts. These programs have proven to be effective means of breaking down the inherent and systematic barriers which have prevented many women business owners from competing and developing their businesses into mature and stable entities.

Should the Small Business Act or STURAA goals program be dismantled, this would inevitably result in fewer

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[1] Pursuant to Rule 35 of the Rules of the Supreme Court of the United States, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed separately.

federal contracts and subcontracts being awarded to women business owners and a continuation of discrimination against them, further stifling their economic development.

STATEMENT OF FACTS

At the center of this case is a subcontracting compensation clause ("SCC") used by the Central Federal Lands Highway Division (CFLHD)[2] which provides a financial incentive to a prime contractor when it subcontracts with small businesses owned and controlled by socially and economically disadvantaged individuals.[3] This type of small business is commonly referred to as a Disadvantaged Business Enterprise ("DBE"). The CFLHD contract states that:

> [a] small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined that the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the Engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

A prime contractor must use a certified DBE to take advantage of the SCC. The CFLHD does not certify businesses as DBEs, but the Small Business Administration (SBA) and the U.S. Department of Transportation (DOT) do.[4]

In this case, a contract was awarded to Mountain Gravel and Construction Company ("Mountain Gravel") to construct a 4.7 mile section of highway referred to as the West Dolores Project. Adarand Constructors, Inc. submitted a bid to Mountain Gravel for the guardrail portion of the project as did Gonzales Construction ("Gonzales"), a DBE. Mountain Gravel awarded the subcontract to Gonzales. Adarand filed suit in the District Court for the District of Colorado, claiming that although Gonzales had submitted a higher bid than Adarand, Gonzales was awarded the contract because it was a DBE and Mountain Gravel received a compensation bonus for using a DBE on the subcontract. Therefore, Adarand claimed it was denied equal protection under the law. The District Court rejected this argument and the Tenth Circuit Court of Appeals affirmed. Adarand filed a petition for certiorari which was accepted by this Court.

Petitioner argues that the criteria used by the SBA for DBE certification is unconstitutional because it creates a presumption that favors minorities. Further, it claims that CFLHD utilized the DBE requirement in conjunction with the SCC to comply with the goal requirements of § 502 of the Small Business Act. Therefore, Petitioner argues that § 502 is unconstitutional as applied.

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[2] The CFHLD is a division of the Federal Lands Highway Program ("FLHP"), which implements programs of the Federal Highway Administration ("FHWA"), a division of the U.S. Department of Transportation ("DOT").

[3] The SCC provides added compensation of up to 1.5% of the total contract amount to any prime contractor who subcontracted 10% or more of the work. See Joint Appendix at 24-27.

[4] The certification process created by DOT is implemented by the various federal, state, and other governmental entities that receive and utilize federal funds on their projects.

Section 502 of Small Business Act requires government-wide goals for procurement with DBEs.[5] One method by which the SBA implements this requirement is through § 8(a) of the Act, commonly referred to as the 8(a) Program.[6] Among other things, the Act sets forth five criteria used to certify a company as a DBE.[7] The SBA has also developed a presumption that certain minority and ethnic groups are socially disadvantaged, one element of the necessary criteria for certification.[8] This presumption is not contained in the Act.[9]

The SBA has created a subcontracting program, commonly referred to as the 8(d) program.[10] This section of the Small Business Act provides contract language that must be included in a subcontract awarded for a federal project; "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or other individuals found to be disadvantaged by the Administration pursuant to § 8(a) of the Small Business Act."[11]

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[5] 15 U.S.C. § 644(g)(Supp. 1994).

[6] 15 U.S.C. § 637(a)(Supp. 1994).

[7] 15 U.S.C. § 637(a)(Supp. 1994) *passim*. (As more fully explained in Argument I.)

[8] This presumption is contained in the regulations implementing the 8(a) Program and is found at 13 C.F.R. § 124.105(b)(1988).

[9] The 8(a) Program is defined and created by 15 U.S.C. § 637(a)(Supp. 1994), which is devoid of any congressional language creating a presumption. There are, however, findings in the statute which state that certain minority groups are economically and socially disadvantaged. 15 U.S.C.§ 631(f)(1)(A)-(C).

[10] 15 U.S.C. § 637(d)(Supp. 1994).

[11] 13 C.F.R. § 124.106(b)(1)(1988).

Congress has also passed legislation creating a DBE goal program for the DOT.[12] This legislation was implemented through regulations at 49 C.F.R., Pt. 23(1988). Similar to the two SBA programs, certification under the DOT process, requires compliance with five elements. Unlike the SBA programs, however, the legislation creating the DOT program contains a statutory rebuttable presumption, specifically providing that women, in addition to racial and ethnic groups, shall be presumed to be socially and economically disadvantaged[13], satisfying two of the five elements.

The narrow issue involved in this case is the constitutionality of § 502 of the Act: "For purposes of this appeal, both parties stipulate that the SCC program is authorized by § 502 of the Small Business Act, 15 U.S.C. § 644(g)(Supp. 1994), and that the constitutionality of STAA

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[12] In 1982, Congress passed the Surface Transportation Assistance Act ("STAA") Pub. L. 97-424, 96 Stat. 2100 (1982) which required state agencies to spend 10% of their federal-aid highway funds on contracts with firms participating in the DBE program. The DBE program was comprised of small businesses which were at least 51% owned and controlled by socially and economically disadvantaged individuals. STAA provided that certain racial and ethnic minorities were presumed to be socially and economically disadvantaged. In 1987, Congress added women to the presumption through the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA") Pub. L. 100-17, 101 Stat. 144 (1987). The provisions of these two acts were later incorporated into the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 1914 (1991) which carries forward the DBE program intact.

[13] *See* Selected Documents Pertaining to the Women's Business Ownership Act of 1988, House Comm. on Small Business, 100th Cong., 2d Sess. (1988). (The House Committee found that "[w]omen have suffered from centuries of prejudice, discrimination, and exploitation.") *Id.* at 1.

and STURAA is not at issue."[14] Part I of Amici's brief will address the § 502 issue.

Despite the stipulation, Petitioner has consistently failed to recognize the distinctions between the SBA programs and the DOT program, treating them as one. Hence, the question accepted for certiorari by this Court is not limited merely to § 502. Instead, it deals with any federal highway goals program, thus implicating the DOT program.[15] The remainder of Amici's brief will demonstrate that this latter program passes constitutional muster.

SUMMARY OF ARGUMENT

Section 502 of the Small Business Act is not race-conscious. Therefore, this Court should consider it to be economic legislation warranting only review under the rational basis standard. Section 502 was enacted to promote the development of disadvantaged businesses to enable them to compete on an equal basis in the American economy. There is ample evidence of the strides made by those disadvantaged businesses who have benefited from § 502 to conclude that it does not violate the Equal Protection Clause.

The goals program under § 502 refers in part to the STURAA goals program. The latter program creates a presumption that women are socially and economically disadvantaged. This Court has consistently applied intermediate scrutiny to gender-based legislation and should do so here. Otherwise, application of strict scrutiny review will

[14] *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1539 (10th Cir. 1994).

[15] The Tenth Circuit Court of Appeals held that Petitioner did not have standing to assert that STURAA's gender presumption was constitutionally impermissible. *Id.* at 1543. Amici do not concede by making the arguments related to DOT that Petitioner has standing.

have the unintended result of discarding 23 years of settled law, in addition to continuing to impair the ability of women to achieve true economic equality.

Contrary to Petitioner's claim, this Court's previous decisions require review under the intermediate level of scrutiny for a program created by Congress to remedy past discrimination. This Court's recent ruling in *Metro Broadcasting v. Federal Communications Commission* compels this result.

Finally, applying this intermediate level of scrutiny will result in upholding the constitutionality of STURAA. For these reasons, this Court should affirm the decision of the Tenth Circuit Court of Appeals.

I. SECTION 502 OF THE SMALL BUSINESS ACT IS NOT RACE-CONSCIOUS LEGISLATION AND, THEREFORE, THE STRICT SCRUTINY ANALYSIS IS NOT APPLICABLE.

The underlying premise of Petitioner's argument is that the race of the business owner is the deciding factor in the DBE certification process under § 502 of the Act.[16] This premise is incorrect and is fatal to the remainder of Petitioner's argument.

A. Congress Did Not Define a Disadvantaged Business as a Minority Business.

When Congress enacted § 502 of the Act, it specifically required that government agencies act in such a manner so as to benefit certain small businesses. The statute specifically defines the type of business Congress intended to benefit: "[n]otwithstanding the Government-wide goal, each agency

[16] Petitioner's Brief at 18.

shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency"[17] As outlined in the Statement of Facts, this type of business is referred to as a DBE, and the SCC required subcontractors to be certified. Becoming certified as a DBE is a complex process open to all companies that can demonstrate they can meet the criteria. Race can be a factor in the process, but Petitioner is wrong when it asserts that race is the only factor.

In determining certification, the certifying agency investigates the applicant and applies five separate criteria derived from the statutory definition contained in 15 U.S.C. § 644(g)(l)(Supp. 1994). A business must demonstrate that it meets each of the following elements:

1. Small business size;[18]

2. Socially disadvantaged owner;[19]

3. Economically disadvantaged owner;[20]

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[17] 15 U.S.C. § 644(g)(1)(Supp. 1994) (emphasis added).

[18] Small business is defined by the SBA in terms of dollar size limitations. 15 U.S.C. § 632(a)(Supp. 1994).

[19] Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. 15 U.S.C. § 637(a)(5)(Supp. 1994).

[20] Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business areas who are not socially disadvantaged. 15 U.S.C. § 637(a)(6)(A)(Supp. 1994).

4. Ownership by the disadvantaged owner must be real and substantial; and[21]

5. Control of the business by the disadvantaged owner must be real and continuing.[22]

In none of these definitions is any group given beneficial treatment. Indeed, no racial group is even mentioned.[23] On the contrary, the carefully crafted statute was designed to aid any business which meets these elements, and specifically avoids using race as a determinative factor.

B. Creation of a Rebuttable Presumption Does Not Make the Statute Race-Conscious.

The only place where race or ethnic origin is solely used as a determinative factor in the entire process is at 13 C.F.R. §124.105(b)(1988). This regulation creates a rebuttable presumption that certain racial and ethnic groups are presumed to be socially disadvantaged. Essentially the rebuttable

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[21] Ownership is satisfied by a small business which is at least 51% owned by a socially and economically disadvantaged individual. 15 U.S.C. § 637(a)(4)(A)(Supp. 1994).

[22] Control is satisfied by a small business whose management and daily operations are controlled by a socially and economically disadvantaged individual. 15 U.S.C. § 637(a)(4)(B)(Supp. 1994).

[23] Petitioner argues that 15 U.S.C. § 637(d)(Supp. 1994) creates a statutory social and economic presumption. This portion of the statute provides that government contracts contain specific language and that the contractor can presume that certain groups are socially and economically disadvantaged. It does not provide that these groups are presumed to be socially and economically disadvantaged for any other purpose, specifically including Section 502 of the Small Business Act. The SBA promulgated regulations that included a presumption, but the presumption does not exist in the statute. See footnote 9 supra.

presumption allows an applicant who falls within a specified classification to avoid having to prove his or her compliance with the second criteria of the certification requirement. It does not, however, allow an applicant within that classification to automatically become certified. On the contrary, the applicant must still demonstrate his or her compliance with the remaining four certification elements -- economic disadvantage, small business size, ownership of the business, and control of the business. There are numerous administrative decisions where minority business owners who fell within the presumption have been denied certification as DBEs for failure to meet these other criteria.[24] Furthermore, an applicant can become certified as a DBE without the use of the rebuttable presumption by demonstrating that, in addition to the other criteria, it satisfies the social disadvantaged requirement.[25] This ability to prove social disadvantage without the benefit of the presumption is demonstrated by the fact that non-minority women-owned businesses have been certified as DBEs by the SBA.[26]

No presumption for economically disadvantaged individuals exists in the 8(a) program. Applicants are required to prove they meet the definition of an economically

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[24] For example, according to the FHA, statistics of Region III in 1992 show that several states denied certification to minority companies for failure to meet the eligibility criteria in spite of the presumption: New Jersey denied certification to D.W. Electric, Inc. because ownership was not real and substantial; Washington denied certification to Input Output Services, Inc. for lack of necessary control; California denied certification to True North Energy Co. because ownership was not real and substantial. In the State of Michigan, between 1991 and 1993, the Office of Equal Opportunity denied DBE certification to twelve minority-owned businesses for failure to meet the remaining criteria.

[25] 13 C.F.R. § 105(c)(1994).

[26] Women are not a class presumed to be socially and economically disadvantaged.

disadvantaged individual as set forth in the statute at 15 U.S.C. § 637(a)(6)(A)(Supp. 1994). In fact, SBA has articulated the following policy: "[t]his program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced, or have overcome, impediments to obtaining access to financing, markets and resources."[27] Furthermore, once a DBE is certified and the SBA believes it is no longer economically disadvantaged, the SBA will conduct a review of its status.[28] Finally, the SBA will review any certification decision whenever a member of the public submits credible evidence that the SBA was given false information, or changes have occurred relating to the business or individual that no longer make it, or him or her, eligible based on economic disadvantage.[29]

In summary, such a process is hardly one where "race [is] the primary factor for the awarding of federal construction procurement contracts by the federal government."[30] The statute in question is not race-conscious and, therefore, the necessity for strict scrutiny is obviated.

C. Section 502 of the Act, in the Absence of the Rebuttable Presumptions, is Constitutional Under a Standard of Rationality.

As amply demonstrated above, § 502 of the Act on its face is racially neutral. Its design is to aid any disadvantaged business enterprise, not just those owned and controlled by

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[27] 13 C.F.R. § 124.106(a)(ii)(1994).

[28] 15 U.S.C. § 637(a)(6)(A)(Supp. 1994).

[29] 13 C.F.R. § 124.101(c)(2)(1994).

[30] Petitioner's Brief at 18.

racial and ethnic minorities. Only the rebuttable presumptions created by regulation give the Petitioner any ability to argue that § 502 of the Act is racially driven, and that a heightened level of scrutiny is necessary in examining it.

In the absence of the presumptions, § 502 of the Act should be considered economic legislation designed to aid small disadvantaged businesses. All applicants, regardless of race, ethnicity, or gender, would be required to demonstrate that they meet the specified criteria for certification. No groups would be entitled to any type of preferential treatment. Thus, the legislation would be similar to the myriad of other statutes that this Court has reviewed and found constitutional in the past.[31] The Court's analysis of these statutes was accomplished under a standard of rationality -- whether the legislation bears a reasonable relation to the purpose that it serves.

This Court should apply the rational basis standard to § 502 of the Act. If this Court elects to deviate from its past precedents and applies strict scrutiny, it should not review the entire Act under that standard. Instead, strict scrutiny should be applied, if at all, to the rebuttable presumptions created by the implementing regulations, since it is only in those

[31] *See e.g., Schweiker v. Wilson*, 450 U.S. 221 (1981) (provision of social security program denying benefits to persons in mental institutions constitutional); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (state law banning sale of milk in non returnable plastic containers, but not banning non returnable cardboard containers constitutional); *Mathews v. DeCastro*, 429 U.S. 181 (1976) (provision of social security program granting benefits to married women with dependents when husband retires or becomes disabled, but not to divorced women, was constitutional).

presumptions that race or ethnic origin is the sole determinative factor.[32] The Act is constitutional.

II. CONGRESS INCLUDED WOMEN WITHIN THE SOCIAL AND ECONOMIC PRESUMPTION IN STURAA SO AN INTERMEDIATE LEVEL OF SCRUTINY IS APPROPRIATE.

For purposes of this case, the Small Business Act procurement process at issue does not stand in isolation. It is intertwined with the DOT Disadvantaged Business Enterprise program.[33] As indicated in the opinion of the Tenth Circuit Court of Appeals:[34] "[t]he eligibility criteria, however, are derived from the DBE regulatory program implemented pursuant to two transportation funding authority acts: STAA, and its renewal act, STURAA. A subcontractor thus qualifies for the SCC program if it qualifies for DBE status under STURAA regulations." Consequently, although this action ostensibly deals with the SBA programs only, it necessarily involves a review of the DOT program. Although the DOT program is quite similar to the SBA programs under review, it differs in two major regards.

First, the DOT program includes women within the rebuttable presumption of socially and economically disadvantaged persons, while the SBA program does not. Consequently, a decision by this Court regarding the race-conscious rebuttable presumption of the SBA programs may inadvertently impact upon the gender-based presumption of

[32] *See Alaska Airlines v. Brock*, 480 U.S. 678 (1987); *Cf., Jean v. Nelson*, 472 U.S. 846 (1985) (court ought not pass on constitutional issues unless adjudication of such is unavoidable).

[33] The regulations and criteria for this program are contained at 49 C.F.R., Pt. 23(1988).

[34] *Adarand v. Pena*, 16 F.3d 1537, 1540-41 (10th Cir. 1994).

the DOT program. Second, the rebuttable presumption in the DOT program is statutorily created while the presumptions in the SBA programs are derived from regulations.

Petitioner argues that the proper standard of review for the SBA programs is the strict scrutiny standard that this Court has employed when reviewing challenges based on race. If the Court adopts this analysis, the unintended result would be to apply the strict scrutiny standard to a gender presumption in the DOT program and sweep away 23 years of settled law.

For a quarter of a century, this Court has consistently held that an intermediate level of scrutiny is the proper standard to be applied when analyzing the constitutionality of legislation employing gender-based classifications. This standard was first suggested in *Reed v. Reed*:[35] "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" This intermediate standard of review has been consistently used by this Court in resolving gender-based constitutional challenges.[36]

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[35] 404 U.S. 71, 76 (1971) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

[36] *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981); *Orr v. Orr*, 440 U.S. 283 (1979); *Craig v Boren*, 429 U.S. 190 (1976). *See also Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Frontiero*, several Justices were willing to apply the strict scrutiny standard to gender-based discrimination that they had developed for analyzing racially based legislation. However, this view has never been accepted by a majority of this Court, and subsequent cases have clarified that the intermediate standard is the proper one to utilize in gender discrimination cases: "[t]o withstand constitutional challenge, previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig*, 429 U.S. at 197.

The inclusion of women in the DOT program demonstrates that neither statute is racially based. Rather, they aim to assist all disadvantaged businesses.[37] Disadvantaged businesses include those owned by non minority women; they could include those owned by non minority men. Thus, the strict scrutiny analysis is certainly inappropriate.

If the subcontracting company that was awarded the contract had been owned by a woman, the Tenth Circuit's standard of review would have been unquestionably correct and this case would not be before this Court. Yet, if this Court adopts Petitioner's arguments, women business owners will lose the advantages provided by the DOT program: advantages that are constitutional as applied to women. This Court should tread lightly in declaring unconstitutional, on racial grounds, a disadvantaged business program that, facially, and as applied to women, most certainly is constitutional under numerous decisions issued by this Court.

III. THE TENTH CIRCUIT COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW UNDER APPLICABLE SUPREME COURT CASES.

In reviewing the decision of the Court of Appeals, this Court is bound by its four-year old opinion in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[38] There, a majority of this Court held that an intermediate standard of scrutiny was appropriate in reviewing programs of the type involved in this case:

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[37] *See supra* Argument I.

[38] 497 U.S. 547 (1990).

> We hold that benign race-conscious measures mandated by Congress -- even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[39]

This was the standard applied by the Tenth Circuit, and it is the proper one to apply here.

Petitioner argues that *Metro* is inapplicable to this case and attempts to distinguish it on the grounds that it dealt solely with First Amendment concerns. Such is not the circumstance. Indeed, a review of the Court's two previous decisions regarding affirmative action contracting programs demonstrates that *Metro* is the logical result of these cases.

Fullilove v. Klutznick[40] is the first instance where the Court wrestled with the issue of a government contracting program designed to remediate past discrimination. There, a provision of the federal Public Works Employment Act of 1977 required ten percent of the federal funds granted for local public works projects to be used by state and local grantees to obtain services or supplies from minority businesses. This Court upheld the validity of the provision, although the various opinions did not rely upon the pronouncement of a specific standard of review. At least five Justices adopted either a standard of intermediate scrutiny,[41] or a two-step approach focusing first on the objective of the

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[39] *Id.* at 564-65.

[40] 448 U.S. 448 (1980).

[41] *Id.* (Marshall, J., concurring).

congressional legislation, and, second, on whether the means selected were specifically tailored to meet that objective.[42]

Several years later, the Court was faced with a similar public works provision established by the City of Richmond. In *City of Richmond v. J.A. Croson Co.*,[43] this Court rejected the City's program as unconstitutional. The Court, however, recognized the distinction between a remediation program established by Congress in *Fullilove*, and one established by a state or political subdivision as was involved in *Croson*.[44] The former implicates a grant of authority to Congress in § 5 of the 14th Amendment, while the latter entails a constraint of power on the states under § 1 of that Amendment.[45] Yet even in *Croson*, the Court continued to adhere to the two-step analysis of Chief Justice Burger used in *Fullilove* with respect to congressional programs.

Thus, the lessons of *Fullilove* and *Croson* are clear: in reviewing state action taken to remedy past discrimination, the Constitution may require that strict scrutiny be applied to ensure that the 14th Amendment is not violated. When the

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[42] *Id.* (Burger, C.J., concurring). *Compare Craig*, 429 U.S. 190 (1976), in which the majority imposed an intermediate level of scrutiny in gender classification cases.

[43] 488 U.S. 469 (1989).

[44] Justice O'Connor, writing for the majority, stated: "[t]hus, our treatment of an exercise of congressional power in Fullilove cannot be dispositive here." *Id.* at 491.

[45] Petitioner fails to recognize that this unique grant of congressional power to remedy past discrimination -- present in both *Fullilove* and the present case -- was absent in *Croson* and *Metro*. Indeed, *Croson* was decided, in part, on this basis, as was the dissent's attempts in *Metro* to impose a stricter standard of scrutiny. *Metro*, 497 U.S. at 605-606 (O'Connor, J., dissenting). Thus, Petitioner cannot point to a single case where strict scrutiny was applied, or even adopted by a sizable dissent, in a case involving a congressional program designed to remedy past discrimination.

program is established by Congress, a lesser standard is applicable. *Metro* correctly recognized these lessons and authorized an intermediate standard of review in those cases involving congressional actions.[46]

IV. THE STURAA GENDER PRESUMPTION SERVES AN IMPORTANT GOVERNMENTAL OBJECTIVE AND IS SUBSTANTIALLY RELATED TO ACHIEVING THAT OBJECTIVE.

A. Congress Determined That Discrimination Against Women Business Owners Must Be Remedied, And Had an Adequate Basis For Doing So.

> This Court is in agreement that whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.[47]

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[46] *Metro* goes beyond *Fullilove* in holding that such a standard is applicable even if the measures are not remedial, per se. This portion of the holding in *Metro* is not at issue in the present case, since the program in question, like the one in *Fullilove*, is specifically designed to remedy past discrimination.

[47] *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 286 (1986)(O'Connor, J., concurring). *See also*, *Craig*, 429 U.S. 190 (1976) (Rehnquist, J., dissenting) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 222.); *Croson*, 488 U.S. at 469. (O'Connor, J, majority opinion) ("Congress may identify and redress the effects of society-wide

Thus, Congress was not required to make specific findings of discrimination when enacting STURAA. Rather, it could rely upon past findings and hearings to support its conclusion that a gender presumption was necessary to rectify the past and present discrimination faced by women in virtually every arena, including public contracting. The Senate oversight committee held a hearing on the proposed STURAA, and noted that:

> The Committee has considered extensive testimony and evidence on the bill's DBE provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry. Congress originally addressed this issue in § 105(f) of the 1982 STAA. . . .
>
> Section 105(f) has helped to reduce the effects of discrimination; however, barriers still remain, preventing minorities and women from successfully competing in the industry. Moreover, the Committee has concluded that the findings adopted by Congress in 1978 when enacting legislation covering projects under the Small Business Act, 15 U.S.C. § 631(e) (Supp. 1994), apply equally to the federally-funded highway and mass transit construction projects covered by this bill.
>
> The DBE program implemented by the Department of Transportation following enactment of § 105(f) operates primarily as a subcontracting program, under which prime contractors must make

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discrimination [and] need not make specific findings of discrimination." *Id.* at 490.)

good faith efforts to achieve DBE subcontracting goals. The Committee has studied the materials presented by non minority subcontractors regarding the program's impact on their businesses. The increased funding for highway and mass transit construction projects has increased the opportunities for subcontractors to compete, and the good faith efforts provision of the program assures that the program does not operate as a quota. Also, since DBE firms compete in many areas of subcontracting, any burden that might be imposed by this program is spread among different groups of subcontractors.[48]

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[48] Numerous other congressional committees and members of Congress have acknowledged the exclusion of women from the federal procurement market and expressed the need to solve this problem. *See, e.g., Federal Contracting Opportunities for Minority and Women-Owned Businesses: Small Business and the Federal Procurement System, Hearings Before the Subcomm. on General Oversight, House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearings before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong. 1st Sess. (1985); *Women Entrepreneurs: Their Success and Problems: Hearing Before the Senate Comm. on Small Business*, 98th Cong., 2d Sess. (1984); S. Rep. No. 387, 100th Cong; 1st Sess. at 11-12 (1987); *H.R. 2351, The Women's Business Equity Act of 1989: Hearing Before Subcomm. on Procurement, Tourism, and Rural Development, House Comm. on Small Business* (Testimony of Ike Skelton, "Women entrepreneurs are vital to our economy. They must have equal access" *Id.* at 42-43,); *Women-Owned Businesses: Special Problems and Access to Credit, Hearing Before the Subcomm. on Exports, Tax Policy, and Special Problems House Small Business Comm.*, 101st Cong., 2d Sess. (1990).

Six hearings were held by the U.S. House of Representatives Small Business Committee in 1988 on problems facing women entrepreneurs. These are summarized in H. Rep. No. 100-736, 100th Cong., 2nd Sess. (1988)(New Economic Realities: The Rise of Women Entrepreneurs). The Committee found that women continue to confront barriers in

Thus, the congressional record is replete with evidence of the discrimination faced by women business owners. Congress treats this as a serious national problem and seeks through STURAA and other measures to assist the economic development of women-owned businesses. The legislation has accomplished this objective to a limited degree. Women-owned businesses have been awarded a greater percentage of subcontracts each year since STURAA's enactment.[49]

Because an important governmental objective has been, and will be, substantially furthered, this gender presumption passes scrutiny under the Equal Protection Clause. *Craig v. Boren*, 429 U.S. 190 (1976). There can be no question that Congress had a firm basis upon which to enact STURAA in an attempt to remedy this pervasive discrimination against women.

B. <u>The Implementation of STURAA is Substantially Related to the Government's Objectives.</u>

One of the objectives of STURAA is to ensure women-owned businesses are better able to compete for government

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receiving commercial credit due to their gender, and women-owned businesses are virtually excluded from government procurement activities, among other things. *Id.*

[49] Since the Congress changed the law in 1987 to include businesses owned by non minority women in the statutory definition of DBEs, the percentage of DBE contract dollars awarded to women-owned firms has increased from 22 to 39 percent. When measured in constant fiscal year 1992 dollars, contract dollar awards to women-owned businesses increased by over 80 percent in fiscal years 1984 through 1992. . . .

Highway Contracting: Disadvantaged Business Program Meets Contract Goal, But Refinements Are Needed, GEN. ACCT. OFF., Aug. 1994 at 4.

contracts despite past discrimination. It accomplishes precisely what it sets out to do.[50] And it does so in a flexible manner which ensures minimal impact on non-women-owned businesses.

STURAA is substantially related to achieving the objectives set out by Congress in that it is neither over inclusive or under inclusive.[51] First, the program is not under inclusive because all small businesses which satisfy the eligibility requirements for the program can be certified and participate.[52] No business is excluded by the racial and gender presumptions.[53] The *Fullilove* Court foresaw and approved of this type of program.[54] Second, STURAA is not over inclusive because even though minority- and women-owned businesses are presumed to be socially and economically disadvantaged, to be certified they must show they can meet the other criteria:[55] small business size, ownership, and control. Therefore, not all companies owned by women and minorities can participate. Additionally, it is not over inclusive because a waiver can be employed in the event of a lack of capacity.[56]

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[50] *See Fullilove* , 448 U.S. 448, 480 (1980); *Metro*, 497 U.S. 547, 569 (1990).

[51] *See Fullilove*, 448 U.S. at 485-486.

[52] 49 C.F.R., Pt., 23.53(1988).

[53] 49 C.F.R., Pt., 23.62(1988).

[54] *Fullilove*, 448 U.S. at 485.

[55] *See Craig v. Boren*, 429 U.S. 190 (1976) (Rehnquist, J., dissenting) ("The rationality of a statutory classification for equal protection purposes does not depend upon the statistical 'fit' between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment." *Id.* at 225-226.)

[56] STURAA provides Secretarial discretion in lowering the 10% goal for DBEs, 49 U.S.C. § 47113(b). One of the committees providing

Importantly, the presumption of social and economic disadvantage is rebuttable.[57] Any credible evidence that the applicant is not socially and economically disadvantaged, rebuts the presumption and places the burden on the applicant to affirmatively prove he or she qualifies.[58] Anyone can challenge the presumption as applied to an applicant, including the governmental agency that is implementing the program. In fact, the guidance given to the agencies implementing the certification regulations specifically warns that the presumption should not be applied in the face of conflicting data, even if a third party does not challenge the presumption: "the existence of the presumption does not mean that the certifying agency must ignore evidence that any applicant for certification is not socially or economically disadvantaged unless a third party brings a challenge."[59]

The foregoing amply illustrates that the implementation of STURAA is substantially related to the governmental objective of remediating past discrimination against women.

CONCLUSION

The narrow issue before the Court is whether the goals and certification process promulgated by the SBA to implement § 502 of the Small Business Act violates the Equal Protection Clause. Amici request that this Court hold that

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oversight for STURAA stated its belief that the Secretary's decision to approve or disapprove a state's request for a reduced goal should be based on, but not limited to, consideration of the following factors: (1) the number of DBE/WBE firms in the state or region; (2) historical data relating to DBE/WBE participation in Federal-Aid highway projects in the state or region; and (3) the minority population in the state or region. S. Rep. No. 387, 100th Cong., 1st Sess. at 12. (1987)

[57] 49 C.F.R., Pt. 23.69(1988).

[58] *Id.*

[59] U.S. Dep't Transp. 1980 DBE Program Manual.

§ 502 is constitutional, and affirm the decision of the Tenth Circuit Court of Appeals. Moreover, if the Court should find that § 502 as applied is constitutionally defective due to the socially and economically disadvantaged administrative presumptions, it should do so only with regard to the presumptions.

Amici do not believe that it is necessary to go beyond a review of § 502. However, if the Court elects to review STURAA, including its statutory presumption in favor of women, Amici urge that an intermediate level of scrutiny be applied to the presumption. This Court has consistently applied this level of scrutiny to classifications based on gender. It should not deviate from this standard here. Applying this standard renders STURAA constitutional.

Respectfully submitted,

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